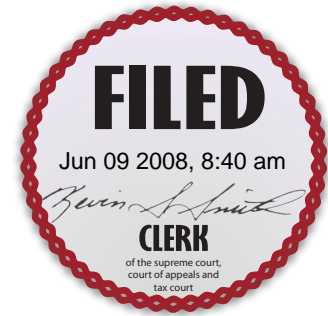


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

NYKAZA GEE a/k/a MYKAZA GEE,

Appellant-Petitioner,

VS.

STATE OF INDIANA.

Appellee-Respondent.

))))))))))

No. 49A05-0801-PC-30

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey L. Marchal, Master Commissioner
Cause No. 49G06-0203-PC-70391

June 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Nykaza¹ Gee (“Gee”) appeals the denial of his petition for post-conviction relief, which challenged his convictions for Criminal Confinement, as a Class B felony,² Aggravated Battery, a Class B felony,³ Battery, as a Class C felony,⁴ and Intimidation, as a Class D felony.⁵ We affirm.

Issue

Gee presents a single issue for review: whether he was denied the effective assistance of appellate counsel.

Facts and Procedural History

On direct appeal, this Court recited the underlying facts as follows:

On March 9, 2002, Anna Woods and Gee lived together in Indianapolis. Woods worked in the cafeteria at Riley Hospital; Gee held no job. Both had keys to the apartment. On that day, Woods left work at about 2:30 p.m. and took a bus downtown to the bank. While at the bus stop, she saw Gee and gave him fifty dollars. Woods returned home, drank a beer and some Crown Royal, then left with her cousin Linda, Linda’s boyfriend and another person to go to Linda’s apartment. While at her cousin’s apartment, Woods drank some more, listened to music and danced.

Woods was driven home, and when she entered her dark apartment she turned on the light. Gee jumped out from behind the door, accused her of sleeping with another man, and hit her in the face. He continued to hit her while pulling her toward the bedroom. He pushed her onto the bed and then got on top of her, straddling her and holding her down. Woods saw a knife in Gee’s hand, and Gee told Woods “he was going to kill me, and that if he couldn’t have me, nobody else could.” (Tr. At 56.)

¹ Documents identify the Petitioner both as “Nykaza” Gee and as “Mykaza” Gee.

² Ind. Code § 35-42-3-3.

³ Ind. Code § 35-42-2-1.5.

⁴ Ind. Code § 35-42-2-1.

⁵ Ind. Code § 35-45-2-1.

Gee stuck the knife in both of Woods' knees. She freed herself, and when she ran past Gee he lunged at her and stabbed her in the back. Woods ran into the living room and called police. When they arrived, Woods was bleeding profusely. She was taken to Wishard Hospital, where she underwent surgery.

Woods suffered injuries to her face, including a split lip and a broken bone near her nose, and sustained stab wounds to her back and both knees. She was kept in the hospital for approximately 3 days, then released to her mother's care. She had to undergo physical therapy and used a walker for about a month.

Gee v. State, No. 49A02-0211-CR-991, slip op. at 2-3 (Ind. Ct. App. Sept. 10, 2003).

Gee directly appealed, alleging a double jeopardy violation and the erroneous admission of evidence that he had previously battered Woods. This Court affirmed Gee's conviction. Id. at 9. On July 28, 2004, Gee filed a petition for post-conviction relief, which was amended on May 29, 2007. Therein, Gee alleged that he was denied the effective assistance of appellate counsel because counsel failed to challenge an untimely amendment to the charging information adding an aggravated battery count and failed to challenge his forty-nine-year sentence.

A hearing was conducted on October 4, 2007. On December 6, 2007, the post-conviction court issued its findings of fact, conclusions of law, and order denying Gee's petition. This appeal ensued.

Discussion and Decision

I.A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a

defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

I.B. Effectiveness of Appellate Counsel

Gee claims his appellate counsel was ineffective for failing to challenge the untimely amendment of the charging information adding an aggravated battery count and for failing to raise sentencing issues. More specifically, Gee argues that appellate counsel should have argued that Apprendi v. New Jersey, 530 U.S. 466 (2000) applied to Indiana's sentencing scheme and also should have asked this Court to review his sentence under the inappropriateness standard, effective January 1, 2003, a date after Gee's sentencing but before his appellate brief was filed.

Appellate ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

The two prongs of the Strickland test are separate and independent inquiries. Id. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Appellate courts should be particularly deferential to an appellate counsel’s strategic decision to include or exclude issues, unless the decision was “unquestionably unreasonable.” Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his claim of ineffective assistance of appellate counsel, Gee must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. Id. Even if counsel’s choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

Amendment of Original Charges. Gee was originally charged with Criminal Confinement, as a Class B felony, two counts of Battery, as Class C felonies, and Intimidation, as a Class D felony. The trial court set an omnibus date of May 28, 2002. On May 21, 2002, the State filed an amendment to the charges, adding Count Five, Aggravated Battery, a Class B felony.

On May 29, 2002, Gee filed a written objection to the addition of the Aggravated Battery count, alleging it was untimely under Indiana Code Section 35-34-1-5(b) which provided in relevant part:

The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
(1) Thirty (30) days if the defendant is charged with a felony . . .
before the omnibus date[.]

On May 30, 2002, the trial court conducted a hearing on the proposed amendment and the objection thereto. The trial court granted the motion to amend, concluding that the amendment did not prejudice Gee's substantial rights because "the same defenses are available to that new charge as were available to the original charges." (Tr. 48.)

Appellate counsel did not raise an issue with regard to the amendment. At the post-conviction hearing, counsel testified that he considered raising the issue, but concluded that the existing case law supported the trial court's ruling that Gee's substantive rights were not affected by the amendment. Gee now points to a 2007 landmark decision, Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007) (concluding that amendments of substance to a charging information could not be made after thirty days prior to the omnibus date, regardless of a lack of prejudice),⁶ and asserts that his appellate counsel should have advanced an argument in reliance upon the pre-Fajardo precedent that would have supported the position ultimately adopted.

In Fajardo, the defendant had been subjected to the addition of a second Child Molesting count one week after the omnibus date and thus outside the parameters of Indiana Code Section 35-34-1-5. On direct appeal, a panel of this Court did not apply the 5(b) prohibition upon amendments to substance after the omnibus date "believing that the ultimate

question was whether or not the defendant had a reasonable opportunity to prepare for and defend against the charges such that his substantial rights were not affected.” Id. at 1205. On transfer, the Indiana Supreme Court held that the addition of the second charge, to which the defendant’s evidence disputing the original charge would not be “equally applicable,” was a matter of substance and thus permissible only up to thirty days before the omnibus date. Id. at 1208.

Gee’s counsel did not have the benefit of the Fajardo decision at the time of Gee’s direct appeal. Instead, there existed conflicting precedent regarding Indiana Code Section 35-34-1-5. The Fajardo court observed:

Ensuing case law, however, has been inconsistent and conflicting, often reflecting the practice and procedure under prior statutes, or imprecisely disregarding the subsection 5(b) timeliness requirement for amendments to substance in favor of the absence of prejudice requirement that subsections 5(a)(9) and 5(c) apply only to amendments of form.

Several cases have permitted amendments related to matters of substance simply on grounds that the changes did not prejudice the substantial rights of the defendant, without regard to whether or not the amendments were untimely. See, e.g., Kindred v. State, 540 N.E.2d 1161, 1170 (Ind. 1989); Wright v. State, 593 N.E.2d 1192, 1197 (Ind.1992), cert. denied, 506 U.S. 1001, 113 S.Ct. 605, 121 L.Ed.2d 540 (1992); Haymaker v. State, 528 N.E.2d 83, 86 (Ind. 1988); Hegg v. State, 514 N.E.2d 1061, 1063 (Ind. 1987). Several other cases likewise have not focused upon whether the challenged amendment was one of form or substance, but have employed components of the substance/form test (whether defense equally available and evidence equally applicable, and whether amendment not essential to making a valid charge) to assess whether the defendant’s substantial rights were prejudiced, which is not a controlling factor for permitting substantive amendments. See, e.g., Brown v. State, 728 N.E.2d 876, 879-80 (Ind. 2000); Sides v. State, 693 N.E.2d 1310, 1312-13 (Ind. 1998); Chambers v. State, 540 N.E.2d 600, 601-02 (Ind. 1989);

⁶ In response to Fajardo, the Indiana Legislature amended Indiana Code Section 35-34-1-5(b), effective May 8, 2007, to provide that an amendment may be made “before the commencement of trial if the amendment does not prejudice the substantial rights of the defendant.”

Cornett v. State, 536 N.E.2d 501, 505 (Ind. 1989); Brooks v. State, 497 N.E.2d 210, 214 (Ind. 1986); Graves v. State, 496 N.E.2d 383, 387 (Ind. 1986). The methodology employed in the cases identified in this paragraph does not comply with Indiana Code § 35-34-1-5.

Fajardo, 859 N.E.2d at 1206-7 (emphasis added).

For purposes of ineffective assistance of counsel claims, the law requires consideration of legal precedent available to counsel at the time of his representation of the accused, and counsel will not be deemed ineffective for not anticipating or initiating changes in the law. Gann v. State, 550 N.E.2d 73, 75 (Ind. 1990). In other words, it is not incumbent upon appellate counsel to resolve conflicts in the law before the Indiana Supreme Court has done so. Gee's appellate counsel did not overlook a significant and obvious issue available in early 2003. See also Leatherwood v. State, 880 N.E.2d 315, 321 (Ind. Ct. App. 2008) (holding that a post-conviction petitioner is not entitled to the retroactive application of Fajardo on collateral review), reh'g denied, trans. pending.

Apprendi Argument. Gee also claims his appellate counsel should have presented a sentencing challenge based upon Apprendi, which set forth the rule that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” 530 U.S. at 490.

Although Apprendi had been decided by 2003, our Indiana Supreme Court had not addressed its application to Indiana's sentencing scheme.⁷ In Blakely v. Washington, 542

⁷ One decision by a panel of this Court had applied Apprendi. See Parker v. State, 754 N.E.2d 614 (Ind. Ct. App. 2001).

U.S. 296 (2004), the Court defined the relevant statutory maximum for Apprendi purposes as “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” The Blakely decision did not address Indiana’s sentencing scheme in particular. It was one year later, in Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005), cert. denied, 546 U.S. 976 (2005), that our Supreme Court applied Blakely to invalidate portions of Indiana’s sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present.

The Smylie decision was not available to appellate counsel at the time of Gee’s direct appeal. As previously observed, only the precedent available to appellate counsel at the time of the direct appeal is relevant to our determination of whether counsel was effective. McCurry v. State, 718 N.E.2d 1201, 1206 (Ind. Ct. App. 1999), trans. denied. Accordingly, Gee’s appellate counsel did not overlook a significant and obvious issue when he did not include an Apprendi-based sentencing challenge.

Inappropriateness of Sentence. Finally, Gee argues that his appellate counsel should have challenged the appropriateness of his near-maximum⁸ forty-nine and one-half-year sentence. The trial court aggravated Gee’s sentence based upon its consideration of Gee’s criminal history, likelihood of his committing future crimes in light of several incidents of domestic violence that did not culminate in convictions, and the extreme brutality of the attacks on Woods. No mitigators were found. Appellate counsel testified at the post-

conviction hearing that he did not consider a sentencing challenge because “sentences were reviewed for manifest abuse [of] discretion” and he “didn’t see that here.” (P.C.R. Tr. 12.)

At the time of Gee’s sentencing in 2002, Indiana Appellate Rule 7(B) provided that a sentence could be revised upon appellate review if the sentence was “manifestly unreasonable in light of the nature of the offense and the character of the offender.” Effective January 1, 2003, Rule 7(B) was amended to provide that a sentence could be revised if the reviewing court finds the sentence to be “inappropriate in light of the nature of the offense and the character of the offender.” Because the rule is directed to the reviewing court, the amendment is applicable to review after January 1, 2003, even when the sentence was imposed prior to that date. Polk v. State, 783 N.E.2d 1253, 1260 (Ind. Ct. App. 2003), trans. denied; Kien v. State, 782 N.E.2d 398, 416 n. 12 (Ind. Ct. App. 2003), trans. denied.

Thus, had Gee’s appellate counsel elected to present a sentencing challenge in this regard, Gee’s sentence would have been reviewed under the “inappropriateness” standard. We next consider whether there is a reasonable probability that Gee’s sentence would have been revised had appellate counsel lodged an inappropriateness challenge.

With regard to the nature of the offense, the advisory (formerly presumptive) sentence is the starting point in our consideration of an appropriate sentence for the crime committed. Childress v. State, 848 N.E.2d 1073, 1081 (Ind. 2006). Here, the offenses committed by Gee were particularly brutal. Gee ambushed Woods as she came in her apartment door and began to “steady punch” her as he dragged her into their bedroom. (Tr. 54.) Gee sat on Woods,

⁸ Gee received the maximum sentences for each of his Class B felony convictions and his Class C felony conviction, and received the presumptive sentence for his Class D felony conviction. See Indiana Code

pinned her arms back, and beat her into unconsciousness. Woods sustained “blunt force injuries of the head” and “a fracture through the base of her skull that caused her left eye to prolapse into her nose.” (Tr. 174.)

Gee stabbed each of Woods’ knees, with resulting injuries described by Dr. Dean Hawley as follows: “The blade ... actually penetrated completely into the joint space of both knees. And the stabbing was down into the bone of the tibia on both sides. The depth of penetration for these injuries is probably three or four inches into the body where the bone was damaged.” (Tr. 248.)

When Woods tried to escape and call 9-1-1, Gee stabbed her in the back. Because of the beating and the swelling of her mouth, Woods had difficulty communicating with a 9-1-1 operator. Gee fled, leaving Woods without medical attention. By the time Woods arrived at Wishard Hospital, she had lost approximately half her normal blood volume and had to be given “multiple blood transfusions for blood loss from the injuries.” (Tr. 247.) In the opinion of Dr. Hawley, Woods had been impacted with force similar to that of a vehicle crash and, but for the surgery, “would have bled to death.” (Tr. 253.) Woods was hospitalized for “about a week in March,” required a walker for “about a month” and first walked without crutches in June. (Tr. 136-37.) The nature of the offenses does not militate toward a lesser sentence.

As to the character of the offender, Gee has typically lacked employment and failed to provide support for his children. His criminal history consists of ten prior convictions, nine of which are misdemeanors and one of which is a Class D felony conviction for Possession

of Cocaine. Gee points out that his prior convictions are largely misdemeanors dissimilar to the instant offenses. However, he also has a history of arrests for violence against women.⁹ A record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense; however, a record of arrest may reveal that a defendant has not been deterred even after having been subject to police authority and can be relevant to an assessment of the defendant's character. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005).

The particularized circumstances of the crimes, together with Gee's criminal history, are such that we cannot say there is a reasonable probability that the ultimate outcome would be different had appellate counsel sought to challenge his sentence for inappropriateness.

Conclusion

Gee has failed to demonstrate that appellate counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Gee's ineffective assistance claim and denying post-conviction relief.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

⁹ Gee had been arrested for battering Woods and at least two other past girlfriends. At the instant trial, Woods testified to two prior incidents in which Gee had injured her. One involved a beating and the other involved Gee cutting Woods with a box cutter. In January of 2002, Woods was admitted to Wishard Hospital with a laceration of the left thumb that "cut completely through the ulnar nerve." (Tr. 245.) There had been "copious bleeding" from the injury and Woods required blood transfusions, surgery to close the wound, and nerve reconstruction surgery.